Tri-State Health Service, Inc. d/b/a Eden Gardens Nursing Home *and* Service Employees International Union, Local 100, AFL–CIO. Case 15–CA–15903

May 27, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On May 4, 2001, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union as the exclusive bargaining representative of the Respondent's nursing home employees in the bargaining unit. The judge further found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with requested information necessary for and relevant to the Union's performance of its duties. For the reasons discussed below, we affirm the judge's findings, with the exception of the withdrawal-of-recognition finding.[3]

The facts are set forth in detail in the judge's decision. In brief, the Union was certified as the representative of the employees of the Respondent's predecessor, Camelot Care, in 1996. In 1997, Camelot entered into a collective-bargaining agreement with the Union. On March 1, 2000,[4] Respondent Eden Gardens Nursing Home took over the operation of the nursing home. On August 2 and 21, the Union requested the Respondent to bargain and to furnish information. The Respondent did not respond to the Union's requests.

The Respondent admitted that it was a successor employer pursuant to *Burns Security Services*, 406 U.S. 272 (1972). Accordingly, the judge found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from and refusing to bargain with the Union, and by refusing to supply the Union with requested information. In reaching this conclusion, the judge rejected the Respondent's contention that it had a good-faith reasonable uncertainty that the Union retained the support of a majority of the unit employees under *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998).[5]

With one exception, we agree with the judge's findings.[6] In addition, we agree with the judge that an affirmative bargaining order is warranted in this case.

I. *ALLENTOWN MACK* "GOOD-FAITH UNCERTAINTY" STANDARD

The Respondent relies on several factors allegedly supporting its withdrawal of recognition from the Union under *Allentown Mack*. These factors include: (1) the drop in the number of employees who voted in a second union election in August 1996; (2) the drop in the number of employees authorizing dues checkoffs; (3) the inactivity of the Union at the nursing home; (4) statements by various employees to Assistant Administrator Suzanne Price expressing their desire not to be repre-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Corp.*, 325 NLRB 17 (1997). In addition, we shall delete the records-preservation provision from the recommended Order, because the remedy does not include an award of backpay. Finally, we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America*, 337 NLRB 175 (2001).

[3] See fn. 6, infra.

[4] All dates are in 2000 unless otherwise indicated.

[5] While this case was pending, the Board issued *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). In *Levitz*, the Board overruled *Celanese Corp.*, 95 NLRB 664 (1951), and its progeny insofar as they permitted an employer to withdraw recognition from an incumbent union on the basis of a good-faith reasonable uncertainty of the union's continued majority status. The *Levitz* Board held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." Id. at 717. However, the Board also held that its analysis and conclusions would only be applied prospectively, and that all pending cases would be decided under existing law as explicated by the Supreme Court in *Allentown Mack*. Thus, the judge has correctly cited and applied the *Allentown Mack* standard in this case. Member Schaumber did not participate in *Levitz* and expresses no view as to whether it was correctly decided.

[6] Although the judge found that the Respondent withdrew recognition from the Union on February 29 and failed and refused to recognize the Union beginning on about July 31, we find that the evidence only shows that the Respondent refused to recognize and bargain with the Union as of August 2, the date the Union first delivered its bargaining demands to the Respondent, which were ignored. The evidence does not establish that the Union had previously demanded, or that the Respondent had previously granted, recognition to the Union as bargaining representative. A successor employer's bargaining obligation attaches on the date it receives the bargaining demand. See *Northern Montana Health Care*, 324 NLRB 752 fn. 4 (1997), enfd. in relevant part 178 F.3d 1089 (9th Cir. 1999); *USG Acoustical Products*, 286 NLRB 1, 11 (1987).

sented by the Union; and (5) Supervisor Wanda Smith's testimony that she overheard three nurses aides expressing their dissatisfaction with the Union.

The second election in August 1996. We agree with the judge that the only probative aspect of that election is the fact that the Union won it. Further, even assuming arguendo that the drop in the number of employees who voted in that election reflected an overall loss of employee support for the Union, we find that the August 1996 election was too remote in time from the Respondent's August 2000 refusal to recognize the Union. See generally *Hospital Metropolitano*, 334 NLRB 555, 556 (2001) (stale evidence is not a reliable indicator of employees' union sentiments).

Decline in dues checkoff. Employee cancellations of dues-checkoff authorizations may be attributable to many factors other than opposition to a union. As the Board observed in *Hospital Metropolitano*, supra, "employees may prefer to pay their dues only at convenient times or in person, or may even be 'free riders' who desire and accept union representation without joining the union and paying dues." Thus, absent some further evidence indicating that employees canceled their dues deduction because they no longer supported the Union, we agree with the judge's finding that this factor did not support a good-faith uncertainty of the Union's majority status.[7]

Lack of union activity. The judge found that the evidence did not support the Respondent's assertion that the facility had been devoid of union activity since mid-1999. We adopt the judge's findings.

Alleged employee statements to Price. The judge effectively discredited Price's testimony that the employees told her they wanted to discontinue their dues-checkoff authorizations because they no longer wanted to be represented by the Union. Accordingly, we agree with the judge that this factor also does not support the Respondent's position.

Employee statements overheard by Smith. The judge found that the overheard statements of three employees expressing their dissatisfaction with the Union might well engender some uncertainty regarding employee support for the Union. However, the judge found that this evidence by itself was insufficient under *Allentown Mack* to establish a good-faith uncertainty of the Union's continued majority status in a bargaining unit which, according to the Respondent, at all times consisted of at least 30 employees. We adopt the judge's findings.[8]

[7] We do not rely, however, on the judge's speculation that employees canceled their dues deductions because of financial distress created by the failure of the Respondent's predecessor to give hourly wage increases required by its collective-bargaining agreement with the Union.

II. AFFIRMATIVE BARGAINING ORDER

Finally, we also agree with the judge, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful refusal to bargain with the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.[9]

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Id. at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court would require and find that a balancing of the three factors warrant an affirmative bargaining order.[10]

[8] We do not, however, adopt or rely on the judge's additional findings regarding the predecessor employer's failure to adhere to the terms of the contract's wage provision, and the impact this violation would have on any employee disaffection. As the judge acknowledged, there is no complaint allegation in this proceeding that the predecessor's conduct was unlawful.

[9] For the reasons more fully set forth in fn. 10, infra, Member Schaumber does not agree with the view expressed in *Caterair International*, supra, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) violation." However, he agrees that a bargaining order is warranted on the facts of this case.

[10] Member Schaumber believes the Board should revisit and reconsider its policy of imposing affirmative bargaining orders in all cases involving 8(a)(5) refusal-to-bargain violations. He agrees with the District of Columbia Circuit Court of Appeals that before making the decision to issue an order requiring the employer to cease and desist from refusing to bargain together with an affirmative bargaining order which precludes valid employee decertification efforts for at least the term of the order, the Board should engage in a careful analysis of the considerations identified by the court of appeals in *Vincent Industrial Plastics*, supra. He is of the view that whether a bargaining order is the

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's refusal to recognize and bargain with the Union. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. As noted, the Respondent never recognized the Union and never suggested it would bargain with the Union. This fact weighs more heavily in favor of the Section 7 rights of former Camelot employees, whose rights were infringed upon by the Respondent's refusal to recognize the Union upon its demand.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's refusal to bargain with the Union in these circumstances because it would permit a decertification petition to be filed before the Respondent has afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where the Respondent's unfair labor practice was of a continuing nature and was likely to have a continuing effect, thereby tainting employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

"appropriate" remedy will depend on the facts of each case. In some cases a cease-and-desist order alone may be adequate while in others a cease-and-desist order coupled with special remedies may remedy the violation and return the parties to the status quo existing before the violation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Tri-State Health Service, Inc. d/b/a Eden Gardens Nursing Home, Shreveport, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(a) and (b) and reletter the following paragraphs.

"(a) Failing and refusing to recognize and bargain with the Charging Party as the exclusive representative of the employees in the following unit, which is appropriate for collective bargaining:

> All full-time, part-time and relief employees employed by the Respondent at its Shreveport, Louisiana facility who work as nursing assistants, laundry, housekeeping/maintenance, food service employees, EXCLUDING all other employees, licensed professionals, guards, office clerical employees, food service supervisors and supervisors as defined by the Act."

2. Delete paragraph 2(c) and reletter the remaining paragraphs.

3. Substitute the following for relettered paragraph 2(c).

"(c) Within 14 days after service by the Region, post at its facility in Shreveport, Louisiana, and at all other places where notices customarily are posted, copies of the attached notice marked 'Appendix B.'[3] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 2, 2000."

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Service Employees International Union, Local 100, AFL–CIO as the exclusive representative of our employees in the following unit appropriate for collective bargaining:

All full–time, part–time and relief employees employed by Respondent at its Shreveport, Louisiana facility who work as nursing assistants, laundry, housekeeping/maintenance, food service employees, EXCLUDING all other employees, licensed professionals, guards, office clerical employees, food service supervisors and supervisors as defined by the Act.

WE WILL NOT fail and refuse to provide Service Employees International Union, Local 100, AFL–CIO with information it requested which is necessary for, and relevant to, the performance of its duties as exclusive representative of the employees in the unit described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL, on request, recognize and bargain with Service Employees International Union, Local 100, AFL–CIO as the exclusive representative of our employees in the unit described above.

WE WILL furnish to Services Employees International Union, Local 100, AFL–CIO the following information it requested, which is necessary for and relevant to its performance of its duties as the exclusive representative of our employees in the unit described above: A list of all employees at our facility, including the employees' names, job titles, shifts, dates of hire, wage rates, addresses, and telephone numbers.

TRI–STATE HEALTH SERVICE, INC.
D/B/A EDEN GARDENS NURSING HOME

Kevin McClue, Esq., for the General Counsel.
Price Barker, Esq. (Cook, Yancey, King & Galloway), of Shreveport, Louisiana, for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. On April 2, 2001, I heard this case in Shreveport, Louisiana. After each side had rested, counsel presented oral argument and on April 3, 2001, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The conclusions of law, remedy, recommended Order, and notice provisions are set forth below.

1. The Respondent, Tri–State Health Service, Inc. d/b/a Eden Gardens Nursing Home, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Service Employees International Union, Local 100, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full–time, part–time and relief employees employed by Respondent at its Shreveport, Louisiana facility who work as nursing assistants, laundry, housekeeping/maintenance, food service employees, EXCLUDING all other employees, licensed professionals, guards, office clerical employees, food service supervisors and supervisors as defined by the Act.

4. At all times since February 29, 2000, based on Section 9(a) of the Act, the Charging Party has been the exclusive bargaining representative of Respondent's employees in the unit described in paragraph 3, above.

5. On February 29, 2000, Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Charging Party and refusing to bargain with it as the exclusive bargaining representative of the bargaining unit described in paragraph 3, above.

6. Beginning on about July 31, 2000, and continuing thereafter, Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Charging Party as the exclusive representative of the bargaining unit described in paragraph 3, above.

[1] The bench decision appears in uncorrected form at pp. 141 through 161 of the transcript [omitted from publication]. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this certification.

7. Since about July 31, 2000, Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish the Charging Party with requested information, described below, necessary for and relevant to the Charging Party's performance of its duties as the exclusive collective-bargaining representative of the bargaining unit described in paragraph 3, above The information requested by the Charging Party is as follows: A list of all employees at the Respondent's facility, including the employees' names, job titles, shifts, dates of hire, wage rates, addresses, and telephone numbers.

8. The unfair labor practices described above affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including recognizing and bargaining with the Charging Party as the exclusive representative of the employees in the unit described above, furnishing to the Charging Party the requested information, which is necessary for and relevant to the Charging Party's performance of its duties as exclusive bargaining representative, and posting the notice to employees attached as appendix B.

On these findings of fact and conclusions of law and on the entire record in this case, I make the following recommended[2]

ORDER

The Respondent, Tri–State Health Service, Inc. d/b/a Eden Gardens Nursing Home, Shreveport, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from the Charging Party as the exclusive representative of the employees in the following unit, which is appropriate for collective bargaining:

> All full–time, part–time and relief employees employed by Respondent at its Shreveport, Louisiana facility who work as nursing assistants, laundry, housekeeping/maintenance, food service employees, EXCLUDING all other employees, licensed professionals, guards, office clerical employees, food service supervisors and supervisors as defined by the Act.

(b) Failing and refusing to bargain with the Charging Party as the exclusive representative of the employees in the unit described in paragraph 1(a), above.

(c) Failing to furnish information requested by the Charging Party which is necessary for and relevant to the Charging Party's performance of its duties as the exclusive bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Charging Party as the exclusive representative of the employees in the unit described above in subparagraph 1(a).

(b) Furnish the following information, requested by the Charging Party, which is necessary for and relevant to the Charging Party's performance of its duties as the exclusive bargaining representative: A list of all employees at the Respondent's facility, including the employees' names, job titles, shifts, dates of hire, wage rates, addresses, and telephone numbers.

(c) Preserve and, within 14 days of request, make available to the Board or its agents for examination and copying, all records necessary to determine that the terms of this Order have been complied with.

(d) Within 14 days after service by the Region, post at its facility in Shreveport, Louisiana, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX A

This is a bench decision in the case of Tri–State Health Service, Inc. d/b/a Eden Gardens Nursing Home, which I will call the "Respondent," and Service Employees International Union, Local 100, AFL–CIO, which, I will call the "Charging Party" or the "Union." The case number is 15–CA–15903.

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that the Government has proven that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Charging Party as the exclusive representative of its employees in a unit appropriate for collective bargaining. Further, I find that Respondent has failed and refused to furnish the Charging Party with requested information which is relevant to the Union's performance of its duties as the exclusive bargaining representative.

This case began on August 23, 2000, when the Charging Party filed its initial charge in this proceeding. On February 23, 2001, after investigation of the charge, the Regional Director for Region 15 of the National Labor Relations Board issued a

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

complaint and notice of hearing, which I will call the "complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "Government."

Respondent filed a timely answer to the complaint, which I will call the "answer." Hearing in this matter opened before me on April 2, 2001, in Shreveport, Louisiana. After both sides had rested, counsel presented oral argument. Today, April 3, 2001, I am issuing this bench decision.

In its answer, Respondent admitted the allegations in complaint paragraphs 1(a) and (b), 4(a)–(d), 5, and 6. Based on these admissions, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

Respondent's answer also admitted certain other allegations raised by the complaint. Additionally, at hearing, Respondent and the General Counsel entered into a written stipulation which is in evidence as General Counsel's Exhibit 5. Based upon these documents, I find that at all material times, David Holland, Wanda Smith, Suzanne Price, and Tollie Bordeaux have been Respondent's supervisors and agents within the meaning of Section 2(11) and (13) of the Act, respectively.

In 1975, Respondent bought a building located at 7923 Line Avenue, Shreveport, Louisiana. Various companies have leased or subleased this building from Respondent and have operated a nursing home in it. In 1996, the Union sought to represent a unit of employees working at the nursing home. On August 28, 1996, the National Labor Relations Board conducted an election, which the Union won.

On April 1, 1997, another company took over operation of the nursing home. This Company was Eden Gardens of Shreveport, Inc., doing business as Camelot Care at Eden Gardens. I will refer to it as "Camelot Care" or simply as "Camelot."

Camelot entered into a collective-bargaining agreement with the Union. In this agreement, Camelot recognized the Union as the exclusive representative of the employees in the following unit:

> All full–time, part–time and relief employees employed by the Employer at its Shreveport, Louisiana facility who work as nursing assistants, laundry, housekeeping/maintenance, food service employees, excluding all other employees, food service supervisors, licensed professionals, office clerical employees and guards, professional employees and supervisors as defined in the Act.

This is the same unit alleged to be appropriate in complaint paragraph 8. I find that it is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The collective-bargaining agreement between the Union and Camelot had a stated term of October 1, 1997, through August 30, 1999. It also contained a provision, called an "Evergreen clause," which stated as follows:

> This Agreement shall continue in effect from year to year thereafter, unless terminated by either party giving the other party written notice of its desire to terminate, revise or amend said Agreement at least ninety (90) days prior to the expiration of the Agreement period or anniversary date.

From the record, it is not entirely clear whether the collective-bargaining agreement renewed itself automatically for 1 year pursuant to this "Evergreen clause." However, the evidence suggests that such a renewal took place.

Camelot experienced significant financial problems. More than once, the power company threatened to cut off electricity because Camelot had not paid its bill.

Because of Camelot's financial problems, it did not comply with the wage provisions of the collective-bargaining agreement. The Union filed a grievance which resulted in arbitration. On October 12, 1999, Arbitrator John F. Caraway conducted a hearing, but Camelot's management failed to appear. On March 9, 2000, Arbitrator Caraway issued a default judgment in favor of the Union.

Camelot's financial problems had other consequences. Camelot leased the nursing home facility from Respondent and fell behind in its rent payments. Therefore, Respondent decided to end its relationship with Camelot and run the nursing home itself.

On March 1, 2000, Respondent took over operation of the facility. From the record, it is not clear exactly when the Union became aware of this change in management, but I infer that the Union did not learn about the change immediately.

Thus, on May 24, 2000, almost 3 months after Respondent began operating the nursing home, the Union notified Camelot that it wished to renegotiate the collective-bargaining agreement. The Union received a June 13, 2000 reply stating that the facility "has been closed for some time."

That statement, however, was not true. The facility itself remained open, although it was being operated by Respondent rather than Camelot.

The Union filed a charge against Camelot with the Board, alleging that Camelot had refused to bargain. The Union then learned that management of the nursing home had changed.

On about August 2, 2000, Union Representative Sadie Harper delivered to the nursing home a letter dated July 31, 2000, and addressed to "Administrator, Eden Gardens Nursing Home." This letter, which is in evidence as General Counsel's Exhibit 3, recounted that the Union had filed a charge against the previous owner and had learned that the nursing home had changed hands. Then, the letter stated

> As a result, we are making this request for bargaining to the current owner/operator. When Ms. Harper requested the name of the owner/operator from you, you told her that was "privileged information." Please forward this letter to the appropriate party for action.
>
> The Union proposed to meet to begin bargaining at 3 p.m. on August 9 in Shreveport, La., at the Local 100 union hall, 5000 Greenwood Rd.
>
> If you are not available on that date, please propose several alternate dates in the same two–week time frame.
>
> Please provide a list of all employees at the facility, with name, job title, shift, date of hire, wage rate, address and phone number.

Respondent has stipulated that the nursing home administrator, David Holland, received the Union's letter and forwarded it to

Respondent's owner and president, Tollie Bordeaux. Respondent also stipulated that it understood the letter to mean that the Union wanted to open negotiations. Further, Respondent stipulated that it did not respond to this letter, and did not submit any documentation to the Union in response to the letter.

On August 21, 2000, the Union mailed another letter to Respondent. This letter, in evidence as General Counsel's Exhibit 4, again requested bargaining, and also requested a list of all employees at the facility, with name, job title, shift, date of hire, wage rate, address, and telephone number.

Respondent stipulated that sometime before August 30, 2000, it received this letter. It also stipulated that it did not respond to this letter. Further, Respondent stipulated as follows:

> Since March 1, 2000, the Respondent has not recognized the Union as the collective bargaining representative of the employees in the unit described in General Counsel's Exhibit 2, has decided not to and stated it will not negotiate with the Union and has not submitted to the Union any documentation and/or information in response to General Counsel's Exhibits 3 and 4.

General Counsel's Exhibit 2 is the collective-bargaining agreement between the Union and Camelot. The recognition clause of that agreement contains the unit description which I have already quoted.

The pivotal question in this case concerns whether Respondent, upon taking control of Eden Gardens Nursing Home, had a duty to recognize and bargain with the Union as the exclusive representative of its employees in the bargaining unit. If Respondent had such a duty, then it violated the law by refusing to recognize and bargain with the Union, and by refusing to provide the Union with the information the Union requested concerning bargaining unit employees.

In its answer, Respondent admitted that a majority of its employees were previously employees of Camelot. Additionally, Respondent has stipulated as follows:

> At all material times, the Respondent has been a successor employer to Camelot in accordance with *National Labor Relations Board v. Burns International Security Services, Inc. et al. Burns International Security Services, Inc*., 406 U.S. 272 (1972).

See General Counsel's Exhibit 5, paragraph 3.

An employer which is a successor under this Supreme Court decision is called a "*Burns* successor." The evidence supports the Respondent's stipulation that it is a *Burns* successor. In *N.K. Parker Transport, Inc.*, 332 NLRB No. 54 (2000), the Board reiterated its standards for determining whether there has been the substantial continuity between two successive employers which would make the second employer a *Burns* successor. The Board stated, in part, as follows:

> In making a "continuity" determination, the Board looks to whether (1) there has been substantial continuity of business operations; (2) the new employer uses the same plant with the same machinery, equipment and production methods; and (3) the same or substantially the same employees are used in the same jobs under the same working conditions and supervisors to produce the same product or provide the same service.

The evidence clearly satisfies this three-part test. Camelot operated a nursing home and Respondent now operates a nursing home at the same location. Moreover, as Respondent's answer admits, a majority of Respondent's employees were previously employees of Camelot. Therefore, I conclude that there is substantial continuity between the business operations of Camelot and Respondent. In accordance with Respondent's stipulation, I find that when it took over the operation of the nursing home on March 1, 2000, it was a *Burns* successor to Camelot.

At first blush, my finding that Respondent was a *Burns* successor, which Respondent does not dispute, would appear to resolve this case in favor of the Government. Under the *Burns* successorship doctrine, if a union was the exclusive representative of a unit of the predecessor's employees, the *Burns* successor must recognize and bargain with the union as the representative of its employees in the same unit.

However, I do not view Respondent's stipulation that it was a *Burns* successor as an admission that it had a duty to recognize and bargain with the Union. By admitting that it is a *Burns* successor, Respondent acknowledges that it would acquire any bargaining obligation which its predecessor possessed. However, Respondent contends that the predecessor did not have any duty to bargain with the Union on March 1, 2000, the date when Respondent took over the facility. If the predecessor had no such duty, then it could not pass such an obligation along to its successor.

Therefore, I must determine whether Camelot Care had a duty to recognize and bargain with the Union at the time the Respondent took over. If Camelot had such a duty, then Respondent acquired it. If Camelot had no such duty, neither did Respondent.

Respondent concedes that it bears the burden of establishing that it held a good-faith, reasonably based doubt that the Union retained the support of a majority of the unit employees. In analyzing whether the Respondent has carried this burden, I begin by noting that, as used here, the word "doubt" means "uncertainty" rather than disbelief. As the Supreme Court stated in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), "If the subject at issue were the existence of God, for example, 'doubt' would be the disbelief of the agnostic, not of the atheist. A doubt is an uncertain, tentative, or provisional disbelief."

To establish the existence of such a doubt or uncertainty, Respondent points to a number of factors. First, it notes that in April 1996, the Union lost an election to represent the unit employees. Only later, in a second election conducted in August 1996, did the Union win.

This argument may be analogized, perhaps, to a situation in which a woman at first declined a suitor's proposal of marriage, but later accepted and went through with the ceremony. I would hesitate to assume that her initial "no" signified that some uncertainty lingered into the marriage long after she said "I do."

Although the Union won the second election, conducted in August 1996, Respondent suggests that the results of this election actually create uncertainty, or at least contribute to uncertainty regarding whether or not the Union enjoyed majority support at the time Respondent took over the facility in March 2000. This argument is rather novel, in that it claims that Respondent was uncertain about the Union's status because of an election which the Union certainly won. To assure that I state the thrust of Re-

spondent's argument correctly, I will quote from Respondent's pretrial brief:

> To Tri–State's knowledge, even fewer employees voted in the second election (8–28–96) and the Union won by one vote. (The actual tally was only 17 of 39 bargaining unit employees voted for the Union which won the election 17 to 7.)

Respondent is incorrect is claiming that the Union won the election by only one vote. The Union won this election by 10 votes, a margin of more than two to one.

To reach the faulty conclusion that the Union won by only one vote, Respondent necessarily must assume that many of the employees who did not vote at all would have cast their votes against representation by the Union. However, such an assumption is hardly proper.

There are many reasons why an employee might not vote at all in the election. For example, the employee may have been sick, out of town on business, on vacation, or attending a funeral. Such reasons have no relationship to the way the employee would have voted if he or she had been present at the polls.

Respondent also asserts that the number of employees authorizing dues checkoffs dropped from 11 in January 1998 to 2 in September 1999. Respondent's brief argues as follows:

> A decline in dues check-offs is an entirely objective measure of union support. While employees can support the union without dues check-off, the fact that employees are stopping dues check-off and dropping out of the Union is an objective sign that the Union is losing support. Further, while the number of employees authorizing dues check-off may not be conclusive, when only a very few of the bargaining unit employees have authorized dues check-off, as here, coupled with such a significant decline in check-offs, it is an objective factor indicating a lack of support for the Union.

Particularly in the circumstances of this case, I cannot agree that a cancellation of dues check-off signifies anything concerning an employee's desire for union representation. At the time of the asserted decline in dues check-off, the employer, Camelot Care, was experiencing extreme financial problems which, in turn, caused the bargaining unit employees significant financial problems.

The Union's collective-bargaining agreement with Camelot is in evidence. It establishes that employees with entry-level seniority began at a wage rate of minimum wage plus 10 cents per hour. Under the contract, each year of seniority raised an employee's wage rate by 10 cents an hour. However, Camelot did not comply with this provision, which resulted in the Union filing a grievance and taking it to arbitration.

Considering the financial stresses placed upon the employees by Camelot's failure to pay the contractual wages, an employee's cancellation of dues check-off may have indicated nothing about the employee's desire to be represented by the Union. Much more likely, it simply signified that the employee was having difficulty making ends meet. In these circumstances, it would not be reasonable to assume that the decline in dues check-off reflected waning employee support for the Union.

In its pre-trial brief, Respondent cited statements which various employees reportedly made to Suzanne Price, who was assistant administrator at the nursing home when Camelot ran it, and who remains assistant administrator of the nursing home under Respondent's management. However, Price's testimony at the hearing falls short of the description in the brief.

Price testified that four employees, Melissa Hall, Bobbie Sowell, Lois Spratt, and May Thomas, requested that their dues check-off authorizations be terminated. Price testified that these four employees made the requests in 1998 but she could not provide more specific information.

Price clearly had little recollection of these conversations in 1998. I do not find that any of the four employees who rescinded their check-off authorizations expressed a desire not to be represented by the Union.

To support its claim of good faith doubts about the Union's status, Respondent also relies on the testimony of Wanda Smith. According to Smith, some time in June or July 1999, she overheard three nurse's aides talking at the nursing station. Smith testified that these aides said that they did not see what good the Union did, that all they did was pay dues but they did not see how it made any difference in their benefits. Smith did not recall the names of these employees.

The statements described by Smith appear somewhat analogous to a statement discussed by the Supreme Court in its *Allentown Mack* decision. In that case, an employee stated that he was not being represented for the $35 he was paying in dues. The Supreme Court concluded that this statement was simply an expression of dissatisfaction with the union's performance which could reflect a desire that the union represent him more effectively but could also reflect the speaker's desire to save his $35 and get rid of the Union. The Court then stated that the "statement would assuredly engender an uncertainty whether the speaker supported the union, and so could not be entirely ignored."

I conclude that this statement might well engender some uncertainty regarding employee support for the Union but that, standing alone, it does not suffice to establish a reasonable good-faith doubt.

Additionally, the statement must be considered in the context in which it was made. The employer at that time, Camelot, had failed to abide by the wage provisions of the collective-bargaining agreement. The Union was taking action, but that action, pursuing a grievance, had not yet produced results.

The complaint in this case names only Tri-State Health Service, Inc. as the Respondent. It does not name the predecessor, Camelot, and it does not allege that Camelot engaged in unfair labor practices which contributed to any decline in employee support for the Union.

However, I note that Camelot's failure to abide by the terms and conditions of its collective-bargaining agreement with the Union would violate Section 8(a)(5) of the Act. Moreover, this violation would lead directly to the employee disaffection reflected by the statements of the nurse's aides. When there is a causal connection between unfair labor practices and employee disaffection with their union, such disaffection cannot form the basis for a good faith doubt regarding the union's majority status. See, e.g., *Stan Scott d/b/a Scott Bros. Dairy, a Sole Proprietor-*

ship, 332 NLRB No. 163 [1542] (2000); *Pirelli Cable Corp.*, 323 NLRB 1009 1997).

The evidence establishes that when Respondent took over operation of the nursing home, it was aware that its predecessor had failed to abide by its collective-bargaining agreement with the Union. David Holland began work as administrator at the nursing home in October 1999, and continued to work as administrator after Respondent took over on March 1, 2000. Respondent has admitted that Holland is its supervisor and agent.

Holland testified that in late October or early November 1999, he received from Union Representative Sadie Harper a notice which is in evidence as General Counsel's Exhibit 6. Harper asked Holland to post this notice at the facility. The notice is entitled "Union Fights for Higher Pay at Eden Gardens" and states, in pertinent part, as follows:

> In 1997, the Local 100 Union in Shreveport won a contract for the union members at Eden Gardens that was supposed to give workers a 10-cent increase in pay for each year of seniority with the nursing home. The raise is in the contract, written in black-and-white.
>
> But the company that owns the nursing home, Camelot Healthcare, refused to pay the raises it had agreed to. The company said it would only give seniority pay for the years worked since Camelot took over the nursing home. So, the union filed a legal action against the company to pay the wages.
>
> Last year, the company had agreed to pay the union workers $10,000 in back pay, and raise their current pay to the correct rates. But the company backed out at the last minute back in February 1999.
>
> **Judge Hears Union Case on Oct. 11 in Shreveport**
>
> So the union re-filed the legal case. On Oct. 11, 1999, a judge heard our case. Union representatives Zack Nauth and Sadie Harper . . . told the judge why Camelot owed the workers more than $30,000 in back pay. The company did not show up for the hearing.
>
> The judge, Mr. John Caraway, said he would make a decision in 60 days on whether the union workers would receive back pay since 1997 (almost two years), and pay raises.

By "judge," the Union notice referred to the arbitrator who heard its grievance. Holland posted the notice next to the time clock.

The record does not show any reason for Holland to have doubted the statement in this notice that Camelot had failed to provide the contractual benefits. Considering Holland's position as administrator, he certainly knew about Camelot's financial problems which caused it to be in arrears even on its electric bill.

When Holland became Respondent's nursing home administrator, he brought with him the knowledge he gained from this notice. In view of this knowledge, which concerned Camelot's failure to abide by the terms of the collective-bargaining agreement, he knew, or should have known, that any employee disaffection with the union was causally related to Camelot's repudiation of or failure to abide by the collective-bargaining agreement.

Considering that Respondent knew of the causal connection between Camelot's failure to abide by the collective-bargaining agreement and the statements of the nurse's aides to the effect that they did not see what good the Union did for them, it was not reasonable for Respondent to rely upon these statements as an indication that employees no longer supported the Union.

In its pre-trial brief, Respondent asserted that apart from this flyer which Union Representative Harper gave to Administrator Holland, and which Administrator Holland posted at the facility, the nursing home was objectively devoid of Union activity since mid-1999. Credible evidence does not support this assertion.

The record suggests that Camelot was playing a game of hide and seek with the Union. Arbitrator Caraway's decision notes that he made a number of attempts to contact Camelot's officials but that his calls went unanswered. The decision also noted that the arbitrator sent a letter to Camelot's chief financial officer, notifying him of the arbitration hearing date, but that no representative of Camelot appeared at the arbitration.

Additionally, in May 2000, when the Union notified Camelot of its desire to negotiate changes in the collective-bargaining agreement, it received a reply that the facility had been closed for some time. That statement obviously was false.

Moreover, the evidence suggests that Respondent continued the practice of hiding from the Union. As General Counsel's Exhibit 3 indicates, when a Union representative contacted the nursing home to find out about the new management, it received the reply that this information was "privileged information." Thus, the Union had to go to considerable effort even to learn the identity of the new management.

As already noted, both before and after Respondent took over the nursing home, David Holland served as administrator. Holland testified that in late October or early November 1999, when Union Representative Harper gave him the notice and requested that it be posted, Holland took the notice to assistant administrator Suzanne Price and said, "I wasn't aware we were in a union." According to Holland, Price replied, "Oh yes, we were in a union. The employees did not like it and dropped out."

I do not credit Holland's testimony to the effect that he did not know that a Union represented a unit of employees at the nursing home. It seems quite incredible that Holland would have posted the Union's notice if he really believed that the Union did not represent the employees.

At the very least, it is quite unusual for an employer to post a notice from a union with which it has no relationship. The record in this case offers no explanation for Holland posting such a notice if he truly believed that the Union did not represent any workers.

Therefore, to the extent Holland's testimony conflicts with that of other witnesses, I do not credit it.

Respondent must establish that Camelot had reasonable doubts about the Union's majority status. It also bears the burden of establishing that Camelot held such doubts in good faith. Respondent has not carried its burden of proof.

To the contrary, the evidence suggests that Camelot's management made a conscious choice to ignore the Union in the hope that it would go away. This "see no union, hear no union, speak to no union" approach creates the impression of monkey business, not good faith.

Respondent has admitted that it is a *Burns* successor. Therefore, if Camelot had a duty to recognize and bargaining with the Union, Respondent acquired that duty. Since Camelot did have such a duty, so does Respondent.

Therefore, I conclude that Respondent, as a *Burns* successor, had a duty to recognize and bargain with the Union as the representative of its bargaining unit employees, and that its failure to do so violated Section 8(a)(1) and (5) of the Act. See *Scepter Ingot Castings, Inc.*, 331 NLRB 1509 (2000). Additionally, I conclude that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the information requested by the Union, which was relevant and necessary to perform its function as exclusive bargaining representative.

In accordance with *Stan Scott d/b/a Scott Bros. Dairy, a Sole Proprietorship*, 332 NLRB No. 163 [1542] (2000), I conclude that an affirmative bargaining order is warranted to protect employees' Section 7 rights. Further, I will recommend that the Board order that Respondent provide the Union with the information it requested.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. This certification also will include provisions relating to the findings of fact, conclusions of law, remedy, Order, and notice. When that certification is served upon the parties, the time period for filing an appeal will begin to run.

Finally, I would like to thank counsel for the very great professionalism and civility which they demonstrated throughout this proceeding. The hearing is closed.